# Distribution of Powers and Functions in Federal Systems

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Canada

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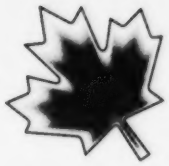
# Foreword

This background study, prepared by Dwight Herperger of the Institute of Intergovernmental Relations at Queen's University, was commissioned in February 1991 by the Federal-Provincial Relations Office of the Government of Canada. The study surveys the great variety of forms and the scope that the distribution of powers may take within various federal systems. In order that this analysis might be available to the public, it is now included in the series of background papers accompanying the release of *Shaping Canada's Future Together: Proposals*.



# Acknowledgements

A broad-ranging examination of federal systems spanning three continents can be a mammoth effort and naturally requires the assistance of many persons. This study is based largely on a reading of constitutional documents and academic interpretive texts. The staff of various embassies and high commissions, in addition to the staff at the Institute of Intergovernmental Relations, were instrumental in making such information available and directing the author to important sources which would otherwise not have been drawn upon.

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# I. Introduction

Federalism has proven remarkably enduring as an organizing principle for governments in countries that seek to maintain elements of both unity and diversity in their populaces and political institutions. The federal principle, broadly defined, relates to the distribution of legislative powers between a general government and regional governments so that each order can act directly on its electorate within its own sphere of jurisdiction, thus providing for a system of shared sovereignty. This principle remains an essential feature of federalism today.

Throughout much of Canada's history the discourse of national politics has often been a discourse about federalism. Currently, Canadians are grappling with a constitutional crisis that threatens to pull the country apart. Following the demise of the Meech Lake Accord, the most recent in a series of constitutional proposals designed to accommodate the place of Quebec in the Canadian federation, the country has embarked on yet another attempt at constitutional reform which, it is hoped, will reconcile the competing and sometimes conflicting views on the federation. The distribution of powers and functions will figure prominently in this constitutional agenda.

This study provides an overview of the distribution of government powers and functions evident in other federal systems, with a view to the relevance of these examples to the current Canadian context. This will entail an analysis of the form that these powers take in different federal constitutions, and the more substantive matter of what areas of jurisdiction are assigned to the two orders of government.

## A. Preliminary Definitions

K.C. Wheare, in his 1946 study *Federal Government* (considered the classic scholarly text on the subject of federalism), defined the federal principle as 'the method of dividing powers so that the general and regional governments are each, within a sphere, coordinate and independent."[1] This definition is significant in that its legalistic phraseology is disposed towards an interpretation of a *division* of powers into independent, "watertight" spheres of jurisdiction. The metaphor of "dividing up

[1] K.C. Wheare, *Federal Government*, 4th ed. (London: Oxford University Press, 1963), p. 10. Note that throughout this study, the following terms are used to describe the constituent units of a federation: provinces, states, Länder, cantons and regional governments. Similarly, although the term "federal government" is generally used for the overarching government, other terms relating to the general use in a particular federation may be used, e.g., Union government in India.

the pie" has been often applied to this aspect of federalism, giving the impression that there is a finite number of government powers that can be neatly assigned to either order of government.

For the purposes of this study, however, the term *distribution* of powers is used, which acknowledges the inherent interdependence of the two orders of government in a federal system. Political scientist Daniel Elazar characterizes this in his concept of federal union as a partnership, recognizing the "distribution of real power among several centers that must negotiate cooperative arrangements with one another in order to achieve common goals."[2] In practice, this partnership has been especially evident in the development of the welfare state in federal systems in the post-war period.

The powers themselves may be either legislative or executive. A further distinction can be made between *de jure* and *de facto* powers and functions. The former refers to those powers that are either explicitly enumerated in the constitutional text itself as federal, provincial or concurrent jurisdictions, or else have been interpreted as such through the process of judicial review. *De facto* powers, on the other hand, are those that are implicitly seen to be under the authority of a particular order of government, because of administrative arrangements that have been put in place, or because of the use of the general spending power.

## B. Selection of Federal Systems

Three types of federal systems have been identified for this comparative study: established federations, which are generally advanced industrialized countries; Commonwealth federations in largely developing countries that were founded after World War II (including two federal "experiments" which ended in failure); and recent examples of systems that have exhibited tendencies towards a federal organization of government powers.

In the first grouping are the United States, Switzerland, Canada, Australia, Germany and Austria. In the second are the new and former federations of India, Pakistan, Malaysia, Nigeria, Rhodesia and Nyasaland, and the West Indies. Finally, a review of recent "federalizing" systems will pay attention to developments in Spain, Belgium and the European Community.[3] What follows is a very brief description of the most essential features of these federal systems.

Beginning with the United States in 1789, the last two centuries have witnessed the introduction and evolution of this unique form of government called federalism. Spanning three continents, the established federations have laid the foundations for a form of government that has proven both stable and sustaining in many of the

[2] Daniel J. Elazar, *American Federalism: A View from the States*, 3rd ed. (New York: Harper & Row, 1984), p. 2.

[3] It must be acknowledged that there are some weaknesses to this classification scheme, particularly in relation to the first and second groupings. The roots of the "newer Commonwealth federations" of India and Malaysia, for example, can be said to predate the founding of the Federal Republic of Germany. Likewise, many of the federations of the first grouping are typically recognized as the "classic federations", although Germany represents a significant departure from classical traditions and Austria is not even considered by some to be a true federation. Nonetheless, the scholarly literature on comparative federalism in the past has tended to follow these categories (at least from a Canadian perspective), and thus the classification has been maintained here.

world's major industrialized countries.[4] This form of government has been so effective and enduring that the original federations have served as models for federal experiments elsewhere, some successful and others not.

## *1. Established Federations*

### United States

The United States of America, the "original modern federation", adopted the innovation of federalism as an organizing principle for its structure of government in 1789 after the failure of a 13-year experiment with a confederal form of government. Originally comprised of 13 colonies, the United States has evolved into a union of 50 states along with various associated units.[5] As the most enduring federation in the world (surviving a civil war in its first century of existence), it has naturally become an important reference point for any comparative study of federalism.

The major feature of the distribution of powers in the United States was the arrangement whereby the constitution listed subject matters under federal government authority — most of which are concurrent and some of which are made exclusive by prohibiting the states from acting on them legislatively — and left the remainder, or residual matters, to the constituent units of the federation. Virtually all attempted and sustaining federations elsewhere have taken into account the constitutional design and operation of the American federal system in developing their own federal frameworks.

### Switzerland

The second federation to come into existence, Switzerland, adopted a federal constitution in 1848. It is a small country currently comprised of 26 constituent units called cantons, of which six are considered "half cantons". The Swiss federation is notable for its significant degree of linguistic and religious diversity, although the German Swiss continue to dominate in numbers and economic power. Its three official languages (German, French and Italian) and two dominant faiths (Roman Catholic and Protestant) represent cross-cutting cleavages, i.e., among German-speaking cantons, some are Catholic and some Protestant; similarly among French-speaking cantons, some are Catholic and some Protestant. The result is that cantons form different alignments on religious and linguistic issues.

A prominent feature of the Swiss distribution of powers is the significantly large proportion of powers assigned to the federal government. As well, the Swiss adopted the innovation of administrative decentralization for particular legislative

[4] For the classic study of these federations, see Wheare, Federal Government.

[5] Puerto Rico, for example, is a unit which, rather than seeking full independence, has instead sought an asymmetrical federal association with the United States while maintaining internal autonomy and self-government. Puerto Ricans are considered citizens of the U.S., but they have no voting rights in national elections. However, they can share in the benefits of being associated with a larger federation without being incorporated within it. For other examples, see Daniel J. Elazar, Exploring Federalism (Tuscaloosa: University of Alabama Press, 1987), pp. 54-8.

matters, making the cantons responsible for the administration of a range of programs established by federal legislation. Switzerland continues to be of particular relevance to the Canadian federation in that it is multilingual and multicultural.

### Canada

Geographically the largest of the established federations, Canada achieved "Confederation" in 1867.[6] Originally a union of four provinces, the federation now comprises 10 provinces and two northern territories. A unique characteristic of the Canadian polity is the existence of a large francophone minority within the federation; this is concentrated primarily in one constituent unit of the federation, the province of Quebec, where it forms the majority.

Perhaps the most innovative feature of the Canadian federation was that it represented the first successful attempt at combining federalism with a system of parliamentary responsible government. This combination was subsequently adopted in Australia, the Federal Republic of Germany (with some modifications), and initially in virtually all of the new Commonwealth federations. As for the distribution of powers, Canada was also an innovator in three respects. First, the Constitution assigns *three* lists of legislative powers — federal, provincial and concurrent — a practice that was subsequently adopted in several younger federations. Second, the general residual power is assigned to the federal government rather than to the provinces. This is contrary to the practice of all other federations except India and, most recently, Nigeria. Third, the distribution of powers is uniquely marked by the inclusion of several federal government unilateral powers, where it can overrule provincial powers. Examples are the powers of reservation and disallowance and the declaratory power, but these have fallen into general disuse during the last 50 years.

### Australia

Australia began as a number of self-governing British colonies, uniting under a federal constitution in 1901. Today, the federation comprises six states, the two predominant ones being New South Wales and Victoria. There are also two mainland territories and several offshore territories.

Like Canada, Australia is an example of a federation governed by a parliamentary system of government. The founders of the Australian federation rejected the Canadian model of a centralized distribution of powers, opting for, among other things, assignment of the residual power to the state governments and enumeration of only federal and concurrent lists of powers. In practice, however, the Australian federation has evolved into a relatively more centralized federation, especially with respect to financial powers. Among the established federations, the Australian constitution is unique in providing for the delegation of legislative authority from the states to the federal government. With its British heritage of parliamentary institutions, Australia is of continuing interest for the study of federalism in Canada.

[6] The term "Confederation" in this context refers to the process of bringing together constituent units into a federation, rather than the structure of a confederation *per se*.

### Germany

A federal republic was proclaimed in "West Germany" in 1949. Another example of a parliamentary federation, the Federal Republic of Germany originally comprised 11 constituent units or *Länder*. The *Basic Law* (as the constitution is called) was regarded at the outset as provisional, allowing for the possibility that one day East and West Germany might reunite to become a single federation. In a series of rapid developments, reunification was achieved in 1990, resulting in the addition of five Länder to the federation. Apart from a few transitional measures relating to financial arrangements, the basic features of the original distribution of powers remain intact in the reconstituted German federation.

Two aspects of German federalism are particularly salient. The second chamber of the Parliament, the Bundesrat, provides for the direct representation of delegates of the Länder (normally Premiers or senior Cabinet members) in federal decision-making. Another feature is the pattern of "administrative federalism", whereby the federal government has a broad range of legislative powers, but the Länder have a mandatory constitutional responsibility for applying and administering a large portion of these laws. Similar arrangements over a more limited range of subject matters are also found in Switzerland. The German arrangements differ significantly, however, in that the constituent units of the Federal Republic of Germany are also directly involved in the federal government decision-making process through their unique representation in the Bundesrat.

### Austria

Austria adopted a federal constitution in 1920, shortly after the demise of the constitutional monarchy of the Austro-Hungarian Empire. Modifications were introduced in 1929 and again in 1945 with the restoration of the Austrian Republic, but the fundamental character of the original constitution remains unchanged. Currently, the federation comprises nine Länder.

There has been a long-standing debate as to whether Austria, a self-described federation, truly constitutes a federal form of government in practice. Scholarly commentators such as Wheare have asserted that, in terms of the distribution of powers, so few matters of importance were assigned to the constituent units of the federation that they remained mere "agents" and "subordinates" of the general government. Nonetheless, the *form* of the distribution of powers is very similar to that found in the Federal Republic of Germany's constitution, including provisions for decentralized administration of federal government legislation and assignment of the residual power to the Länder.

## *2. The New Commonwealth Federations*

After the Second World War, many former British colonies in the developing world undertook experiments with federalism as an organizing principle for their governments. Some were successful and enduring, and others ended in failure. This study includes an examination of six such federal systems: three in Asia, two in Africa and one in the Caribbean. Among these, several common factors emerge: all

were previously British dependencies and thus share similar British political traditions; as in Canada and Australia, an attempt was made initially in each to combine parliamentary government with a federal constitution; these new Commonwealth federations have significant multicultural and multilingual compositions (unlike the United States, Germany and Austria); and rapid economic and social development has been an imperative in all of these federations. Notwithstanding these similarities, the new Commonwealth federations provide an opportunity to examine the potential and limits of different constitutional and institutional arrangements in different political and social contexts.[7]

## India

The Federal Union of India was established in 1950. The antecedents to this federal state can be found in the *Government of India Act, 1935*, in which the British government attempted a federal solution as a means of resolving the problems facing India at that time. Variations among regional units relating to geographic size, natural resources and differing traditions of language, culture and religion proved to be significant challenges in that earlier period. The most significant consequence of this was the partition, in 1947, of British India into two sovereign states: India, with its predominantly Hindu population, and Pakistan, with its predominantly Muslim population.

The federal constitution established in India three years later was characterized by a very strong Union government, a bias clearly reflected in the distribution of powers. Based on the earlier *Government of India Act*, the independence constitution of 1950 provides for three lists of legislative powers, with the residual powers going to the Union government. There is a degree of asymmetry with respect to one constituent unit of the Indian federation, the acceded state of Jammu and Kashmir, which has been given powers different from those of other states. A significant reorganization of the constituent units on a primarily linguistic basis was introduced in 1956, and the federal union came to comprise 14 states and five territories.

## Pakistan

Following the partition of India in 1947, the federation of Pakistan was created by using the 1935 *Government of India Act* as an interim constitution. A period of considerable instability followed partition, during which martial law was imposed. A new constitution was adopted in 1956, retaining the three exhaustive lists of central, state and concurrent powers. Further modifications adopted six years later included not only an executive presidential system, but also a significant revision of the form and enumeration of the distribution of powers. The 1956 list of exclusive federal government powers was retained, but the earlier concurrent and provincial lists were omitted, being replaced by assignment of the residual power to the provinces.

[7] For a comprehensive review of the founding and initial operation of these federations, see R.L. Watts, *New Federations: Experiments in the Commonwealth* (Oxford: Clarendon Press, 1966).

The Pakistan federation, as originally established, consisted of three provinces and some other territories in the west and a single province in the east. Under the 1956 constitution the former group was consolidated into a single province, so that the federation had the unique characteristic of comprising only two regional units — the provinces of West Pakistan and East Pakistan — which were geographically separated by more than 1,500 kilometres of Indian territory. The two parts of the country, differing in almost every respect except for a common Islamic religion, nonetheless remained bound together by a fear of domination by a Hindu India and by a desire for the Islamic way of life. Nevertheless, the geographic remoteness and continuing linguistic, cultural and economic disparities left these two provincial units in a state of precarious equilibrium. East Pakistan eventually seceded, following a civil war in 1971, to become the independent state of Bangladesh. Although Pakistan (the former West Pakistan) continues to exist as a federation consisting formally of four provinces and one centrally administered territory, in practice its operation is closer to that of a unitary system.

**Malaysia**

The Malaysian federation comprises 14 states. This federation was established in 1963 when neighbouring Singapore and the Borneo states of Sarawak and Sabah joined the already existing federation of Malaya. Malaya had achieved independence in 1957, adopting a federal constitution with a highly centralized distribution of powers modelled on the *Government of India Act*. When the wider federation of Malaysia was formed, the three exhaustive lists were maintained but substantially modified in terms of their operation in Singapore and the Borneo states. Only two years later, Singapore was expelled from the federation.

A significant political feature of Malaysia is the communal character of its population in relation to language, religion and social customs. As in India and Pakistan, the Malaysian federation is characterized by a high degree of centralization, and the three lists of legislative powers in its constitution are similar to the *Government of India Act, 1935*. Perhaps the most distinguishing feature of Malaysia's distribution of powers is the considerable degree of asymmetry in terms of legislative, executive and financial autonomy ascribed to the constituent units, particularly to the acceded Borneo states (and to Singapore before its expulsion).

**Nigeria**

Nigeria first adopted a federal constitution in 1954. The federation originally comprised only three regions. This was then changed to four regions, one of which (the Northern Region) had over 50 percent of the territory and population of the country. Subsequently, the regions were divided into a larger number of smaller states and their number was further increased to 30 in 1991, a reflection of Nigeria's large population of about 100 million. A sense of shared identity, originally fostered by British rule, has been in part sustained through the recognition of economic interdependence among the different regions. It is also important to note that the Nigerian federation has been subject to several periods of military rule.

The original constitution provided for two lists of powers, one exclusive to the federal government and the other concurrent, with residual authority lying with the regions. Revisions in the following decade included conversion of the federation into a republic, but the essential features of the distribution of powers remained the same. A significant redrafting of the constitution occurred in 1989. As in many other newer Commonwealth federations, the distribution of powers is characterized by a significant bias towards strong federal government powers, particularly in relation to revenue-raising authority. Another important feature is the existence of a number of unilateral emergency powers, introduced in 1960 and common to many of the newly independent federations, which the federal government has not hesitated to exercise on several occasions.

### Rhodesia and Nyasaland

An example of a federal experiment which ended in failure, the federation of Rhodesia and Nyasaland was established in 1953 with three territorial units: Southern Rhodesia, Northern Rhodesia and Nyasaland. In uniting these three territories, an attempt was made to reconcile the divergent interests of its black and white populations, concentrated to differing degrees in the three territories. Federalism, however, was essentially imposed by a small white oligarchy upon an unwilling majority of native Africans, and served to accelerate the spread of militant African nationalism.

The distribution of powers was organized so that the more significant powers, particularly economic ones, were allocated to the federal government and primarily served the interests of white settlers. Powers of less significance, but of interest to the African populations, were given to the regional governments. Tensions and conflict increased and eventually, in 1962, the imperial government permitted Nyasaland to secede. The federation was officially dissolved the following year.

### West Indies

Established in 1957, the federation of the West Indies was an attempt to link islands spanning a distance of almost 2,000 kilometres into a federated structure of 10 islands or groups of islands. Very few powers were assigned to the federal government, relative to other federations in this study, and there was a significant lack of financial resources to make even these effective. The West Indies experiment was also unique among other federations in that the federal union commenced without a customs union or common currency. Within a short time, it became obvious that the sense of community shared by the islands was not sufficient to hold the federation together. This was exacerbated by the relative paucity of powers to generate loyalty and support for the federal government. Following the secession of Jamaica and then Trinidad, the "salt water federation" was officially dissolved by the British Government in 1962, only five years after its founding. The experience shows in part the limits of a largely decentralized distribution of powers in terms of inducing and maintaining federal cohesion.

## *3. Recent "Federalizing" Systems*

Federalism has been experiencing something of a revival as an organizing principle of governance in the last two decades. Both single unitary states and groups of fully sovereign states have embarked, either implicitly or by design, on a process of sharing sovereignty and legislative authority between different orders of government within or above their traditional structures. Three such states or systems are Spain, Belgium and the European Community (EC). They supply examples of "federalizing" systems and provide an opportunity for Canadian observers to assess how other countries are managing the simultaneous pressures for integration and decentralization in a context of increasing economic globalization and rapid political change.

### Spain

After some 40 years of dictatorial regime, Spain adopted a new constitution in 1978 which established a system of parliamentary democracy. Traditionally, Spain was a strongly centralized unitary state. Its new constitution, however, allowed for the creation of an intermediate unit of government between the existing central and local or municipal authorities. These units are called "Autonomous Communities" (AC). Under the constitution, procedures allow for nationally elected parliamentary representatives within a particular area to claim enhanced autonomy for that area by writing a "Statute" which either has to obtain the approval of a regional referendum or else has to be ratified by the general Parliament. If successful, the "Statute" would officially recognize an Autonomous Community.

It was initially anticipated that this option for enhanced autonomy or regional decentralization would be exercised by only three historically powerful sub-state nationalist movements — in Catalonia, Euzkadi and Galicia. By 1983, however, as many as 17 territories had successfully claimed the status of Autonomous Community (with varying levels of authority and responsibility). Of these, only a handful have an inherent regional identity based on culture, language and a sense of shared history. It is not surprising that the institutional structure developed to accommodate this new level of government has come to exhibit a considerable degree of asymmetry. The new Spanish constitution does not define itself as explicitly federal, but nonetheless provides for lists of powers which are exclusive to both the general and regional governments (ACs), while assigning the residual power to the general authority. It is interesting to note that while Spain is engaged in a process of devolution towards achieving federalism within its own borders, it is also responding to pressure for integration through its involvement with the European Community.

### Belgium

Belgium as a sovereign state has existed only since 1830, when it was split from the Netherlands, and for much of that history it has been a decentralized unitary state. It is a multilingual society, composed of large Dutch- and French-speaking populations, along with a small minority for whom German is the main language. It has

long been subdivided into nine "provinces", but these have served as little more than municipalities, holding only administrative powers and acting under the direct supervision of the central government.

In the last two decades, however, Belgium has experienced a significant devolution of authority from the central government. Three stages of constitutional reform, beginning in 1970 and continuing in 1980 and 1988-89, have restructured the Belgian state along linguistic ethno-regional lines. Associated with this has been a gradual evolution toward more autonomy and enhanced "competences" or legislative authority for the new institutions, reflecting these cleavages, so that Belgium now considers itself to be a federation. The most complex feature of this restructuring is how the constituent units have come to be defined. There are two distinct categories of these — Communities and Regions. The former create a *personal* jurisdiction, the latter a territorial jurisdiction. In practice, the jurisdictions of Communities and Regions are partly overlapping. Additionally, Belgium's detailed language legislation follows the principle of fixed territoriality, which has led to the creation of four linguistic areas: three have a policy of unilingualism and one is bilingual.

The distribution of powers which follows from this arrangement of two types of constituent units and a predominantly territorial language policy is highly complex. Nonetheless, the Belgian experience can be instructive for Canada in terms of how constitutional and institutional reform has been employed to govern a bilingual and multicultural society. It also serves as a model for evaluating how a country responds to simultaneous pressures for devolution (through the "federalizing" process within its borders) and integration (through its membership within the EC).

**The European Community**

The European Community is unique amongst the systems chosen for this study in that it is an example of political and economic integration of separate and established nation-states. Many analysts describe the EC as evolving towards a type of federal union, although this remains a matter of considerable debate. (For a more detailed description and analysis, see *The European Community: A Political Model for Canada?* in this series of background papers.)

The EC actually comprises three communities established by treaty: the European Coal and Steel Community (ECSC, 1951), the European Economic Community (EEC, 1957), and the European Atomic Energy Community (Euratom, 1957). A set of governing institutions has developed since 1967, the most notable being the Commission, the Council, the European Parliament and the Court of Justice. These institutions do not as yet comprise a fully fledged federal government because important decisions are made only through the jointly arrived at directives of the member states, and the institutions themselves lack an independent fiscal base.

Nonetheless, the framework for a distribution of "competences" or powers in the Community is of considerable relevance to the Canadian case. In particular, the broad "mandates" ascribed to Community institutions such as the Council to issue directives on numerous matters relating to the member states are worth noting. Currently, the scope of these powers is limited primarily to maintaining a common eco-

nomic market, but there are proposals for extending powers under a political union to include such matters as external relations (including defence), energy policy and cultural policy. The criterion which would determine the assignment of these proposed powers has come to be known as the "principle of subsidiarity". This asserts that decisions in governmental systems should be taken at the lowest level possible, closest to the people who are affected by them. However, a recent resolution of the European Parliament indicates that subsidiarity is not the only rule determining the proper assignment of powers:

> Where powers have not been exclusively or completely assigned to the Community, it shall, in carrying out its tasks, take action wherever the achievement of these objectives requires it because, by virtue of their magnitude or effects, they transcend the frontiers of the Member States or because they can be undertaken more effectively by the Community than by the Member States acting separately.[8]

The continuing experience of the EC in assigning spheres of jurisdictional authority provides a unique opportunity for observers in other federal systems to examine the limits and potential of modernizing their own distribution of powers, especially in a context of increasing economic globalization.

## C. Criteria for Assessment

The distribution of powers and functions in federal systems has often proven to be a source of conflict and controversy. In virtually all of the federal systems included in this study, at one time or another federal and state governments have attempted to increase or enhance their respective legislative spheres of influence, often at the expense of the other level of government. Such controversy was not the dominant issue in the Confederation "debates" in Canada in the 1860s, but as the Canadian federation has evolved, the debate over the distribution of powers has become one of the more prominent items on the agenda for constitutional reform.

The appropriate distribution of powers in a federal system is a matter of concern not only to governments and their elected members, but also to citizens. Political scientist Garth Stevenson suggests that there are three factors which tend to determine the extent of this citizen concern: the seriousness and significance of real or perceived conflicts of interest among territorially-based subnational groupings; the extent to which opposing interests are perceived to be represented within either order of government; and, the scope and extent of the activities themselves that are carried out by the federal government.[9] Each of these factors is clearly operative in Canada. With the advent of a constitutionally entrenched Charter of Rights and Freedoms, Canadians have come to view the Constitution and its reform as an affair not only of governments, but of citizens, too. The issue of the distribution of powers is likely to be viewed in a similar fashion, i.e., in terms of the way it affects citizens' interests.

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[8] Resolution of the European Parliament, 21 November 1990.

[9] Garth Stevenson, "The Division of Powers" in Richard Simeon (research coordinator), *Division of Powers and Public Policy*, Research Study of the Royal Commission on the Economic Union and Development Prospects for Canada, Vol. 61 (Toronto: University of Toronto Press, 1985), p. 72.

What are the relevant criteria used in determining the appropriate distribution of powers and functions in a federal system, especially when considering possible changes to such powers through constitutional reform? In Australia, this question was posed to an advisory committee of the 1985 Constitutional Commission, which was established to provide recommendations for possible future reforms. Reporting in 1987, the Committee suggested that there was no *a priori* basis for viewing particular legislative powers as inherently federal or regional in character, notwithstanding a few areas of supposedly "minimum federal competence" such as defence, external relations, international trade and some areas of taxation.[10] Nonetheless, the Committee provided a list of 15 factors which were expressly or implicitly used in arriving at the report's recommendations (see Appendix A). At the same time, the Committee members maintained that such factors could not be truly regarded as specific criteria for assessment, since "they did not eliminate the need to make judgements based on ideological or subjective considerations, and they were...either too abstract or complex to provide the desired assistance."[11]

While there is perhaps no *a priori* basis for determining why a particular subject matter should in the first instance be under the jurisdiction of a particular order of government, it is possible to identify several considerations for evaluating proposed changes to existing distributions of power. The Australian Committee's list has been adapted and modified here to serve this purpose. Thus, in assessing the distribution of powers for the federal systems identified in the previous section, it is suggested that due consideration should be given to the following matters:

- **Citizenship and community**
  - —the extent of accord on fundamental rights and freedoms, both individual and collective
  - —the strength of constituent groups' desire to maintain their identity or distinctiveness
  - —the degree of consensus on the need for uniform federation-wide standards in programs to which citizenship provides entitlement
- **Delivery of public goods and services**
  - —whether an order of government can effectively and efficiently deliver services, avoiding wasteful competition or duplication where possible
  - —whether there exist externalities or spillover effects in the provision of services, and whether constituent units can effectively deal with them
  - —whether experimentation and innovation are important, such that intergovernmental competition is deemed desirable
- **Economic growth and union**
  - —the extent to which there should be mobility of people, goods, services, capital and information in order to secure an economic union

[10] Australia, Advisory Committee to the Constitutional Commission, *Report on the Distribution of Powers* (Canberra: Commonwealth of Australia, 1987), p. 1.

[11] *Report*, p. 2.

—the extent to which control over fiscal and monetary levers is necessary for macroeconomic and stabilization policy

- **Accountability**
  - —the need to match fiscal resources with the responsibilities of each order of government to provide for responsible and accountable decision-making
  - —the extent to which it is desirable to provide for horizontal fiscal balance among the constituent units (e.g., equalization)
- **Flexibility and feasibility**
  - —the need for adaptability and reform so as to respond to unforeseen circumstances and changing citizen preferences
  - —the desirability of asymmetrical distributions of power (actual or potential)
  - —the political feasibility of reforming the existing distribution of powers, given past attempts to do so.

# II. Forms of Constitutional Distribution of Powers

Although a constitutionally entrenched distribution of powers between two orders of government is considered perhaps *the* defining characteristic of federalism, not all federal systems have adopted a uniform approach to the general form and enumeration of these powers in their respective constitutions. An examination of legislative powers in federal constitutions reveals variations relating to the number of lists of powers, the specificity and comprehensiveness of individually enumerated powers, the placement of the residual power, the exclusivity of powers assigned to each order of government, and provisions for paramountcy in the case of shared or concurrent powers. As well, various federal systems have adopted arrangements whereby the federal government defines through legislation the broad principles for particular programs (or entire fields of jurisdiction), and the constituent units are left with the responsibility for execution and administration. Moreover, some federal constitutions provide for a distribution of powers which operates differently in one or more constituent units of a federation (i.e., asymmetry). And, finally, devices such as intergovernmental delegation of legislative power and the constitutional entrenchment of federal-state agreements have been used in some federations to allow greater flexibility and adjustment in the practice of these powers.

## A. Form and Enumeration of Powers

### *1. Listing of Powers*

It is difficult to establish an exact standard for the number of lists of powers and the number of the enumerated powers within these lists in various federal constitutions. The United States constitution, for example, provides a list of 18 powers and a residual power. Most of these specified powers are federal (some allowing for concurrent exercise of these powers) and include the enumeration of some matters on which state legislation is expressly prohibited (i.e., making them exclusive federal powers). Canada's *Constitution Act, 1867*, as amended, is somewhat more elaborate,

providing for three lists of powers — one federal exclusive list (29 matters), one provincial exclusive list (16 matters) and a short enumeration of concurrent or shared powers (currently three matters). An even more striking contrast to the U.S. example is India's constitution, which enumerates a total of 144 powers in three different lists.[12]

Nonetheless, three general patterns are discernible in the federal systems under study. The first is the provision for an exclusive list of federal powers, leaving all other matters as a residual to the states. This was the practice followed in the 1962 Pakistan constitution. The second pattern follows an identification of three lists of powers — federal, state and concurrent — along with a residual designation. Canada, India and Malaysia are examples of this approach (the similarity is not purely by accident since the constitutions of the latter two were indirectly modelled on the *Government of India Act, 1935*, itself modelled on Canada's *British North America Act, 1867*). Finally, the third and most common pattern is to have only two lists — federal and concurrent — with the unspecified residual power going to the states. This was the path followed in the original constitutions of the United States, Switzerland, Australia, the Federal Republic of Germany, Nigeria, Rhodesia and Nyasaland and the West Indies.

Moreover, there seems to be a correlation between the time when a federation was established and the comprehensiveness of the formal specification of the distribution of legislative powers in the constitution. In the late 1700s, the role of the state in public life in the United States and elsewhere was rather limited, and thus there was no need to identify explicitly government functions and legislative authority which did not exist at that time. However, with the development in this past century of modern industrialized economies and societies and the rapid growth of state activity and intervention, a more comprehensive identification of jurisdictional authority has been incorporated in more recent federal constitutions. This is especially evident in the constitutions of the new Commonwealth federations and the recently reformed Belgian constitution.

## *2. The Residual Power*

The residual power, simply defined, assigns jurisdictional authority to either the federal or regional governments for matters which do not fall under the classes of subjects enumerated in the constitutional text. The purpose of a residual power may be twofold: to provide for regional or state authority in cases where such powers are not explicitly listed in the constitution (e.g., United States and Australia); and to account for unforeseen matters which arise over time as a country develops economically and socially. Moreover, given the considerable uncertainty which can exist regarding the proper assignment of legislative powers when previously sovereign states decide to federate, the residual power can also serve to reassure the federating

[12] It is somewhat misleading to say that a particular constitution enumerates a specific *number* of powers, for there are significant variations across federal systems relating to how broadly or narrowly these powers are actually defined. For example, items such as "defence" or "trade and commerce" are very broad subject matters, whereas authority for, say, the "pensions of teachers" would be considered a specific matter. Enumerated *categories* of powers are identified for expository purposes.

units that they retain control over unforeseen areas of policy. In practice, fields of jurisdiction which were not originally enumerated as such have become occupied by one order of government or the other based on proximate jurisdictional authority, as judged by the constitutional umpire of the federation (usually the Supreme Court) through judicial review.

All but two of the full-fledged federations examined in this study have assigned the residual power to the state or regional governments. The exceptions to this norm are the federations of Canada and India, which formally ascribe the residual authority to the federal government. A further exception can be found in the recently revised Nigerian constitution, which explicitly provides for a divided or shared residual power, i.e., the residual power is assigned to both orders of government. In practice, as a result of judicial review, a somewhat similar situation exists in Canada. Typically, it has been assumed that where the residual power was assigned to regional governments, the purpose was to underline their autonomy, and where assigned to federal governments, it was to fortify an attempt to establish a strong central authority. This assumption seems to be borne out by the apparent intentions of the founders of, on the one hand, the U.S. and Swiss federal systems and, on the other, the Canadian and Indian federations. However, it is interesting to note that in the United States and Canada, the apparent intentions have been reversed by subsequent practices or significant judicial review. There are other historical reasons for the assignment of the residual power. Prior to the establishment of a federal constitution in the United States and Australia, there was either no general government or what central institutions existed were rudimentary at best. Thus it seemed logical to provide the preexisting regional units with the residual authority. In India, the placement of the residual power in the hands of the Union government was derived from the *Government of India Act*, which in turn was modelled on Canada's *British North America Act, 1867*, which was the first exception to the general pattern of allocating residual authority to the constituent units.

The significance of the residual power is related to the number and comprehensiveness of enumerated lists of legislative power — the greater the enumeration of powers, the less significant the residual power. In established federations where there is a longer history from which to judge, those which *do not* have lists of enumerated powers for the constituent units (e.g., the United States and Australia) have exhibited a tendency over time towards the progressive centralization of government powers. On the other hand, in those federations which *do* have lists of enumerated state or provincial powers (e.g., Canada), there has been a tendency towards the reinforcement of these powers, or at least tempering the expansion of federal authority. Among newer Commonwealth federations, the potential scope of residual authority has been widest in federations such as the West Indies, where relatively few legislative powers were enumerated in the constitution. In marked contrast is India, where the current constitution includes three exhaustive and comprehensive lists identifying legislative powers. As a result, the residual power in this federation has proven to be relatively insignificant.

### *3. Concurrency and Paramountcy*

While Wheare's classic statement of the federal principle asserts the necessity of each order of government having at least one class of exclusive powers upon which to legislate, it does not preclude the possibility of both orders exercising legislative authority in shared or concurrent fields. Indeed, virtually all federal constitutions provide for concurrent authority in particular legislative matters. This is not surprising given that cooperation and interdependence are inherent in any federal form of government. In all cases of concurrent or shared jurisdiction, federal constitutions contain a paramountcy provision that determines which order of government will prevail in cases of conflicting legislation. This order is then said to possess *potential* though not actual exclusive jurisdiction, since it could possibly occupy the whole field.

Concurrency has several advantages in federal systems. It introduces an element of flexibility and innovation in the distribution of powers, allowing the federal government, for example, to postpone its exercise of authority in a particular field until a matter becomes of federal importance. The constituent governments may thus in the meantime proceed with their own initiatives. The federal government may also wish to legislate federation-wide standards (in the field of social services, for example) while leaving provincial governments the opportunity to deliver such services in a manner sensitive to local circumstances. In the case of developing countries (such as the newer Commonwealth federations), the device of concurrency also enables the federal government to temporarily occupy what are typically provincial fields of jurisdiction when the governments of the latter are incapable of providing services that they themselves desire. Finally, concurrent lists of legislative power obviate the necessity of enumerating complicated, minute subdivisions of individual functions to be assigned exclusively to either order of government.

The extent to which concurrency has been incorporated into federal constitutions varies significantly. Among established federations, the Federal Republic of Germany has made the most extensive use of concurrency in distributing its government powers and functions, with the *Basic Law* enumerating nearly twice as many concurrent powers as there are federal government exclusive powers. Moreover, the constitution identifies, in addition to one long list of concurrent powers, a second shorter list of "joint tasks". The latter is a variant which enables the general government to legislatively define broad principles or framework provisions in several explicitly defined matters (namely postsecondary education and the improvement of regional economic and agrarian structures) while leaving the Länder with the responsibility to further define such programs through their own legislation and administrative action. Other federations with substantial lists of concurrent powers include the United States, Australia, and Switzerland. Canada is unique in having so few concurrent fields listed in the constitution, although the impact of judicial interpretation and the use of the federal spending power in areas of exclusive provincial jurisdiction has created many areas of functional concurrency. In the newer Commonwealth federations, concurrency has been employed extensively, especially in matters affecting the development of local or regional economies.

Almost invariably in federal systems, paramountcy in fields of concurrent jurisdiction falls to the federal government. There are two noteworthy exceptions. In India, a provision derived from the *Government of India Act, 1935* permits state laws enacted under the authority of the concurrent list to prevail over conflicting federal Union legislation *if* the state laws have previously received the assent of the President. Ultimately, however, the Union Parliament retains the right to override such an enactment by introducing legislation of its own later on. The other exception can be found in Canada's *Constitution Act, 1867*, as amended. While most of the very few matters falling under concurrent jurisdiction are subject to federal paramountcy, the matter of pensions and survivors' benefits — as enumerated in Section 94A — is unique in being subject to provincial paramountcy.

## B. Executive/Administrative Distributions of Power

So far, the focus of this study has been on the distribution of *legislative* powers. It has been assumed that the allocation of executive authority is coextensive with legislative responsibilities *within* orders of government. Such arrangements reinforce the autonomy of legislative bodies and ensure that each order of government has the full authority to implement and enforce its own legislation. This is particularly appropriate in parliamentary federations where the principle of parliamentary executive responsibility requires that executives be responsible and accountable to their own legislature.

However, some federations have constitutionally entrenched arrangements in which different orders of government assume different responsibilities for *executive* and *administrative* functions in specific subject matters or entire fields of jurisdiction. These arrangements do not make a system any less federal.

There are a number of examples of this arrangement.[13] First is the case of the Federal Republic of Germany. Contrary to the typical *legislative* distribution of powers between two orders of government, the German constitution provides for an *administrative* distribution in which the federal government assumes the vast majority of legislative authority (either as exclusive federal powers or concurrent ones shared with the Länder), while the Länder are responsible for the implementation and administration of many federally-legislated programs falling under concurrent jurisdiction. Thus, the Federal Republic of Germany is highly centralized in legislative terms while being considerably decentralized administratively. However, the Land governments are directly and integrally involved, through their unique representation in the Bundesrat, in the development of the federal legislation which they administer.

The more common pattern amongst other federal systems is the application of administrative decentralization to a narrower range of enumerated subjects — usually from the concurrent list — rather than vast ranges of jurisdictional authority. Typically, such arrangements recognize the increased efficiency arising from more local or regionalized applications of general policy or from eliminating the duplication of administrative services. In practice, these arrangements are most evident in the Asian

[13] Note that these permanent and institutionalized arrangements are to be distinguished from provisions for the *temporary* delegation of legislative and executive authority, which are discussed in a following section.

federations, notably India and Pakistan, but they also exist in two older federations, Switzerland and Austria. An example of such an arrangement in Canada is found in the administration of justice. These examples have shown that there are benefits to be realized from administrative decentralization in relation to federal legislation.

## C. Asymmetrical Allocations of Jurisdiction

In most federal systems, states or provinces are considered equal in that they share the same legislative powers. However, some federations provide for an asymmetrical distribution of powers in order to recognize the significant variations among constituent units relating not only to the geographi size and population, but also to their particular social, linguistic, cultural and economic composition.[14] Essentially, there are two methods for federal systems to recognize asymmetry in the distribution of powers. One approach is to increase federal authority in particular regions or states of the federation. In the first six years after the establishment of the federal Union of India, this type of asymmetry was adopted to assist several regions which were less advanced politically than their neighbouring provinces, through the temporary assumption of state legislative powers by the Union government. In contrast, in Rhodesia and Nyasaland a more advanced constituent unit — Southern Rhodesia — opted for an extension of federal legislative authority in matters relating to the regulation of agriculture.

The second and more common approach to an asymmetrical allocation of jurisdiction is to increase the autonomy of particular states. The most prominent example of this can be found in the Malaysian federation. As part of the negotiations to join Singapore and the British Borneo territories to the already existing federation of Malaya, special concessions were made regarding the application of the existing distribution of legislative powers in these new states. At the time, Singapore was experiencing problems in the fields of labour and education and thus sought to maintain control over these matters, even though in other states these same matters fell within the federal government's legislative authority. The concessions were granted, but quickly became irrelevant when Singapore left the federation two years later. The more sustained example can be seen in the concessions made to the Borneo states. Certain matters under federal government jurisdiction in the Malaysian federation — such as native laws, communications, shipping and fisheries — were allowed to become state or concurrent responsibilities in the two Borneo states, while other matters such as immigration remained under federal authority but required the approval of the Borneo states when they were exercised within those territories.

A degree of asymmetry in the distribution of powers is also evident in relation to one constituent unit of the Indian federation, namely the acceded state of Jammu and Kashmir. Following the enactment of a constitutional order in 1954, the authority of Union powers under the concurrent list did not apply to this state (although Union exclusive powers remained operative), and the residual power was assigned to the state rather than the Union government as in the case of other states.

[14] In the Canadian context, the concept of asymmetrical federalism is perhaps more readily recognizable through the use of terms such as "special status".

Asymmetrical allocations of jurisdiction in other systems are not as uncommon as one might think. Political scientist Daniel Elazar has identified more than 20 examples of what he calls "associated statehood" or "federacy" in which smaller states or regional units, rather than seeking full independence, have opted for an asymmetrical federal association with a larger federation (often a former colonial power).[15] An asymmetrical distribution of powers is also evident in the apparently "federalizing" experiment underway in Spain, as more and more areas of the country seek the status of Autonomous Community through the "Statute" procedure. There are two methods to the procedure adopted in Spain, resulting in the assignment of either a "high level" or "low level" of responsibilities for an officially recognized region. Moreover, the subject matter of the Statute itself can vary from region to region.

In Canada, there are a few, albeit limited constitutional provisions which have an asymmetrical effect. Section 94 of the Constitution, which allows for federal government legislative authority to provide for uniformity of laws relating to property and civil rights, applies to only three of the four original provinces (Ontario, New Brunswick and Nova Scotia, but not Quebec). This provision has never been invoked, but was designed to protect Quebec's civil law. Other examples include provisions relating to denominational education rights (applying to Ontario, Quebec, Manitoba, Alberta, Saskatchewan and Newfoundland) and language (Manitoba, New Brunswick and Quebec) which constrain the exercise of legislative authority or impose obligations on governments.

While the general pattern among most federal systems has been to apply the same legislative powers to each constituent unit of the federation, it is nonetheless evident that there are examples of asymmetrical applications. It could be argued that these arrangements should require an adjustment to the representation of these constituent units in the central institutions of the federation. It is worth noting, however, that in the case of Malaysia, those states with greater autonomy are nonetheless represented equally with the other constituent units in the central institutions of the federation.

## D. Devices for Flexibility and Adjustment

In most federal systems, the constitutional enumeration of the distribution of government powers and functions established at the time of federation has proven to be remarkably enduring. The United States constitution, for example, has over two centuries continued to provide the basic blueprint for the workings of a very successful federal system. Change, however, is as much a function of the life of governments as it is of societies, and so the distribution of powers must respond to this dynamic. Formal constitutional amendment is the most obvious means to effect such change when deemed necessary, and it has been employed occasionally in most federations. However, it is not the only means by which federal systems adapt their distribution of powers and functions to changing circumstances. What follows is a cursory examination of several devices for flexibility and adjustment evident in federal systems —

[15] See Daniel J. Elazar, *Exploring Federalism* (Tuscaloosa: University of Alabama Press, 1987), pp. 54-7.

devices which if adopted in the Canadian context, may, in some cases, require formal amendment of the constitutional text or may in others be achieved through existing or nonconstitutional provisions. The following discussion pays particular attention to the possible application of these devices in Canada.

### *1. Extensive Concurrency*

Already a feature of the distribution of powers in most federal constitutions, concurrency could possibly be used more extensively to enhance flexibility and adaptation in the Canadian Constitution. The exclusiveness and specificity of enumerated powers in separate federal and state lists can contribute to intergovernmental conflict and competition, especially when contentious jurisdictional battles must ultimately be resolved by a constitutional umpire such as the Supreme Court. Concurrent jurisdiction, on the other hand, "clarifies issues and lays the constitutional foundation for intergovernmental cooperation rather than for intergovernmental conflict."[16]

In the context of the current constitutional debate in Canada, recent proposals have suggested that increased recourse to concurrent powers could provide an effective means of accommodating the competing demands for constitutional reform evident in Quebec and the rest of Canada.[17] According to advocates of these proposals, a significantly expanded list of concurrent powers with provincial paramountcy — based on the principles inherent in Section 94A — would allow a province such as Quebec to achieve additional jurisdictional powers to protect and enhance its distinctiveness within the country, while at the same time allowing other provinces to retain the benefits of common action through federal jurisdiction. While such a device could result in a *de facto* degree of jurisdictional asymmetry, provinces would retain equality of constitutional status, as the opportunity for enhanced provincial autonomy would remain equally available to all provinces within the federation.

### *2. Intergovernmental Delegation*

As noted above, several federal systems have constitutionally assigned the federal government legislative authority in certain fields of jurisdiction, while leaving the executive and administrative responsibility for the delivery of programs, services or regulations in these areas with the constituent units of the federation. Another means by which federal systems may be made more adaptable to changing circumstances is the device of a temporary delegation of powers. Delegation can be either from the federal government to the regional governments or vice versa; to or from one or more of the constituent units (i.e., not requiring unanimous consent of all units); for both legislative and executive powers; for varying periods of time (with an opportunity for formal review); and for one or more subject matters. The advantage of such arrangements is that they enable the temporary transfer of authority to meet

[16] J. Peter Meekison, "Distribution of Functions and Jurisdiction: A Political Scientist's Analysis" in Ronald L. Watts and Douglas M. Brown (eds.), *Options for a New Canada* (Toronto: University of Toronto Press, 1991), p. 278.

[17] See for example David Milne, "Equality or Asymmetry: Why Choose?" in Watts and Brown, *Options for a New Canada*, pp. 287-307, and Thomas J. Courchene, *The Community of the Canadas*, Reflections Paper no. 8 (Kingston: Institute of Intergovernmental Relations, 1991).

the needs of special circumstances. The use of delegation does not violate the federal principle as long as there are provisions for the consent of affected governments and for proper fiscal compensation.

Most federal systems provide for the delegation of executive authority. If not explicitly stated in the constitution, the practice has usually been sanctioned by the courts. In terms of legislative authority, provisions for delegation are not as widespread, and usually occur only from the federal to state governments. Of the established federations, only the Australian constitution provides for the delegation of legislative authority, and then only from a state to the federal legislature. However, in all newer Commonwealth federations, with the exception of Nigeria, the constitutions have generally permitted the delegation of legislative authority from the federal to state legislatures. In Canada, proposals to revise the Constitution to allow for legislative delegation have been advanced by the Rowell-Sirois Commission, the 1964 First Ministers' Conference (which produced the Fulton-Favreau amending formula) and, most recently, the 1991 Beaudoin-Edwards Special Joint Committee on the Process for Amending the Constitution.

### *3. Federal-Provincial Agreements or Accords*

It has been proposed that the Canadian Constitution recognize the ability of the federal and provincial governments to enter into agreements or accords relating to specified subject matters and to provide the protection of the Constitution to such agreements under certain circumstances. The device of federal-provincial agreements is intended to satisfy competing jurisdictional claims without resorting to a formal amendment of the Constitution. Canada has had a long history of intergovernmental agreements, covering matters such as tax collection and economic and regional development. An example of the potential of this approach is the recently concluded agreement between the federal government and the province of Quebec on immigration. Considered a major step in resolving federal-provincial differences in this area, the agreement nonetheless remains subject to legislative override and is not entrenched in the Constitution.

In its final report released in 1985, the Macdonald Commission advocated the inclusion of a provision allowing for the constitutional entrenchment of federal-provincial agreements. It cited the example of the 1985 Atlantic Accord reached by the federal and Newfoundland governments, which provides for the joint management of offshore resources and the sharing of revenues. It is interesting to note that the wording of the Atlantic Accord actually anticipates the possibility that its provisions may eventually become constitutionally entrenched.

### *4. Optional Occupation of Jurisdiction: "Opting Out" and "Opting In"*

The device of optional occupation of jurisdiction is foreseen in specific provisions in Canada's *Constitution Acts, 1867 to 1982* and in some recent proposals for constitutional reform. Two approaches to this device are possible. First, there is the concept of "opting out", which can apply to matters of concurrent jurisdiction (such

as pensions and survivors' benefits, as enumerated in section 94A), to the application of constitutional amendments (sections 38(2) and 40 of the *Constitution Act, 1982*), or to fields in which the federal government exercises its spending power in areas of exclusive provincial jurisdiction (for example, the proposed section 106A of the Meech Lake Accord[18]). In principle, such "opting out" could allow provinces to establish programs parallel to federal initiatives and could provide for reasonable fiscal compensation.

The second approach, "opting in", finds its conceptual origins in two provisions of the Canadian Constitution: section 94 of the *Constitution Act, 1867*, which provides for the authority of the federal Parliament to pass uniform laws in relation to property and civil rights in three of the four original provinces of the federation (never invoked); and section 23(1)(a) of the Charter of Rights and Freedoms in the *Constitution Act, 1982*, which enumerates certain minority language educational rights which do not come into effect in Quebec until that province gives its consent.

### *5. Interstate Agreements*

An interstate agreement (or compact) is another example of a device allowing for flexibility in the distribution of powers, and it finds its origins in the United States constitution. The device permits two or more states to enter into an agreement for joint action, and becomes effective upon achieving Congressional consent. Applied to the canadian context, these arrangements could establish federation-wide standards for such matters as interprovincial trade barriers and professional certification. The advantage of this approach is that it allows for the achievement of an interprovincial consensus in relation to certain subjects without the direct intervention of the federal government, whose initiative might be perceived by the constituent units of the federation as merely an attempt to expand its own jurisdiction.

[18] Since the proposed section 106A dealt only with *new* national shared cost programs established by the federal government, it would be more accurate to say that the provinces were given the right to decide not to opt in to such programs.

# III. Scope of Powers and Functions

In a comparative study of the distribution of powers in federal systems, a central questions remains. What are the actual legislative activities or functions which comprise government activity in federations, and how are they allocated between the two orders of government? Given the expansive scope of government in the twentieth century and the considerable diversity evident in the federal systems under examination, this is no small task.

At the outset, it is necessary to define a classification scheme which organizes these powers and activities into categories within which comparisons can be made. For the purposes of this study, two general groupings of such powers are outlined. First, there are the *legislative powers which translate into the broad range of programs, services and activities* undertaken by federal and state governments, either independently or in a cooperative capacity. Within this grouping, five categories are identified, relating to: (1) international relations; (2) the functioning of the economic union; (3) social affairs; (4) design and operation of the legal system; and (5) a final category of "other matters" which do not fall neatly into the previous four categories or have been selected for special attention given their relevance to the current constitutional impasse in Canada.

Second, there are the *powers and practices of public finance* in federal systems. These purely fiscal powers are distinguished from those of the first grouping for one important reason: although a particular order of government may be constitutionally responsible for legislating and delivering programs and services in a number of subject areas, such powers could prove to be meaningless in practice without the means or fiscal capacity to finance these activities. Thus, it is necessary to examine the financial frameworks of these federations in terms of both their constitutional design and their *de facto* evolution. In this respect, there are three main categories of powers to consider: (1) taxation and revenue collection; (2) intergovernmental transfers; and (3) the special case of the federal spending power.

The following will provide an overview of the most significant examples of the scope of powers and functions in the federations being studied, and identify common patterns of allocation as well as any exceptions or innovations as they may occur. The particular assignment of these powers and functions in specific federations is exhibited as a series of tables in Appendix B.

## A. General Legislative Powers and Functions

At the broadest level, the general principle underlying the allocation of authority and legislative responsibility in federal systems has been that matters of common interest and concern to the country as a whole should be assigned to the federal government, and matters of a decidedly regional or local character should be assigned to the provincial or state governments. The general pattern which emerges from this principle is that matters such as defence, foreign policy, currency, and external and interstate trade typically fall within the jurisdiction of the federal government, while more regionally or locally oriented matters such as public health, primary and secondary education, social services and municipal government fall within the purview of provincial jurisdictional authority. In instances where strong national and regional interests coincide, powers have been either concurrent or further subdivided into federal and provincial spheres or aspects.

Such a broad statement naturally does not fully explain the overwhelming complexity of governmental arrangements in practice, and cannot possibly account for the multitude of factors which distinguish one federal system from another. Therefore, one needs to probe further and examine the actual allocation of powers and functions in these federal systems.

### *1. International Relations*

In virtually all of the federations under consideration, powers over defence reside exclusively with the federal government. Two minor provisions in the United States and Australian constitutions allow the state governments to legislate in some matters relating to the armed forces (e.g., the establishment of a regionally based militia), but such provisions are ultimately subordinate to the broader federal powers over defence. So too has the development of foreign policy and the operation of diplomatic service by and large resided with the federal governments.

The power to implement international treaties and agreements, however, has proven to be a contentious issue in many federal systems, as exhibited in the variety of provisions enumerated in constitutional texts and arising from judicial review. At issue is the extent to which an international treaty or agreement concluded by the federal government enables this authority in effect to legislate upon matters which normally fall within provincial jurisdiction. While there have been only a few instances where powers over treaties have been tested in the courts, it is possible to discern three different patterns or approaches among federations. First, in federations such as the United States, Switzerland and Australia, the power to implement treaties is primarily within the authority of the federal government. Second, in several of the new Commonwealth federations, namely India, Pakistan and Malaysia, the capacity of the federal government to implement treaties is qualified by a constitutional requirement to consult the constituent units of the federation when treaties are likely to affect provincial legislative powers. This consultation, however, is not binding on the federal government.

Third, the greatest limitations on federal treaty powers are found in Canada and in the constitution of the now defunct federation of Rhodesia and Nyasaland. In the latter case, consultation and *consent* of the constituent units were required in order for international treaties to become operative when they affected areas of regional legislation. In Canada, in order for the performance obligations of an international treaty to be met when such treaties affect areas of provincial jurisdiction, the provincial governments must pass the necessary implementing legislation. This proviso is not explicitly stated in the Constitution, but rather stems from the 1937 ruling of the Judicial Committee of the Privy Council in the *Labour Conventions* case.[19] The decision was an attempt to deal with the dilemma arising from jurisdictional authority over the processes of *formation* and *performance* of international treaty obligations. If the federal government were given exclusive control over both processes, it would mean that its legislative authority could theoretically extend to virtually any subject (including exclusive provincial matters) upon which it could make a treaty. The safeguarding of provincial autonomy inherent in the Judicial Committee's ruling, however, has important implications for the conduct of foreign policy, for it limits the federal government's ability to guarantee the performance of treaty obligations with other countries when matters under provincial jurisdiction are involved.

Citizenship and immigration are two other subjects in the broad category of international relations upon which federal systems must distribute jurisdictional authority. The most common approach to citizenship is to provide for federal government authority over a single federal citizenship, a practice followed in all the established federations, with the exception of the Federal Republic of Germany, and many of the new Commonwealth federations. However, in some federal systems where constituent units have enjoyed a long history of their own distinctive citizenship (especially prior to federating), there have been constitutional provisions which allow for the retention of a provincial citizenship in addition to the national one. Examples of such provisions can be found in the federal constitutions of Malaysia and the West Indies. In Switzerland, citizenship actually has a threefold basis: communal, cantonal and federal, with the upper levels of citizenship being normally derived from the lower. The federal government retains an overall authority for citizenship, but cantonal governments normally set the standards within the limits established by federal legislation.

The allocation of legislative powers over immigration in various federations is relatively straightforward. In established federations, concurrency is the norm, and federal governments assume authority over such things as levels of immigration into the federation as a whole, while provincial governments share legislative responsibility in those matters which directly relate to their own territorial jurisdiction. In the new Commonwealth federations, a similar distribution of powers has developed in practice, although broad immigration matters affecting the federation as a whole have been singled out in most federal constitutions as an exclusive federal authority.

[19] *A.-G. Can. v. A.-G. Ont.* (Labour Conventions) [1937] A.C. 326.

## *2. Functioning of the Economic Union*

Under this very broad heading are numerous subjects for which jurisdictional authority has been allocated in a variety of ways to either or both orders of government in federal systems. Such subjects can include trade and commerce, currency, banking, insurance, transportation and communications, and resources. What follows is an overview of the more significant examples of distributional arrangements in some of these matters.

The power to regulate "trade and commerce" is enumerated in almost all federal constitutions as an exclusive federal authority. For those federations which do not explicitly identify trade and commerce in the constitutional text, it is nonetheless implicit that this general power resides with federal authority. The West Indies was an exception to this general pattern. Trade and commerce was not enumerated in the constitution. Given the very decentralized design of that federation (it did not even provide for the establishment of a common market), it is not surprising that the federal government did not assume the powers that federal governments in other federations have been assigned in this respect. In Germany, trade and commerce is listed as a concurrent power, but the federal government remains responsible for the vast majority of legislative responsibilities while the Länder are restricted largely to the execution and administration of such legislation.

A power as broad as trade and commerce is naturally open to varying interpretations. Therefore it is not surprising that the exercise of it has been subject to considerable judicial review, particularly in the United States and Australia. When individual aspects relating to the functioning of the economic union are identified, the particular allocations of power becomes more clear. As a general rule, the regulation of trade with foreign countries and between the constituent units of a federation has been placed under federal jurisdiction in federal systems. These matters appear as a concurrent authority in Australia (but with federal paramountcy). Trade *within* a constituent unit of a federal system usually remains the legislative responsibility of the provincial governments in the established federations. Nevertheless, it is a concurrent or partly federal authority in some of the newer Commonwealth federations where attempts at developing economic interdependence within the federation have been considered a major priority.

To facilitate these trading relationships, federations must also have a properly functioning monetary system. The most basic component of this system is currency, which falls under the exclusive authority of federal governments in every federal system except the defunct West Indies. In the case of allocation of powers over banking, however, two general patterns are evident. In Canada, Switzerland, India, Malaysia and Nigeria, legislative responsibility for banking (i.e., chartered banks) is an exclusive federal authority (although it should be noted that in Canada, the provinces have a significant role in regulating "near banks" and securities). In other federal systems such as the United States, Australia and Pakistan, these responsibilities are either shared or concurrent, allowing for the development of a dual system of chartered banks. Legal tender and the issuing of money nonetheless remains under federal authority.

Transportation and communications is also integral to the proper functioning of a federal economic union. The allocation of powers and functions in these fields can vary significantly, although in certain matters the federal governments clearly dominate. Legislative responsibility for roads and bridges is generally a shared field in federal systems, with either order of government exercising authority over those aspects most relevant to them. Control over railways is similarly divided in most of the established federations, while it generally remains an exclusive federal authority in Switzerland and most of the new Commonwealth federations. In Malaysia, an asymmetrical distribution gives the federal government exclusive jurisdiction over all railways except in the state of Sabah. The original federal constitution of Pakistan was unique in placing jurisdictional responsibility for railways in the hands of provincial governments, although this is not surprising given that the two major regions of East and West Pakistan were not connected by rail.

Civil aviation, by virtue of its transcending character in relation to regional borders, is generally a federal authority in current federal systems. Since aviation could not have been foreseen as a mode of transportation prior to the invention of the aircraft, this federal authority in the older federations has been recognized largely through the process of judicial review. Only in Switzerland was the federal constitution formally amended to recognize aviation as a federal responsibility. In federations created in the 1940s and later, it was possible to identify explicitly the matter of aviation in their constitutions.

In the fields of telecommunications, postal services and broadcasting, primary jurisdictional authority rests mainly with the federal governments in nearly all federal systems. The international and interstate aspects of telecommunications have been under federal authority in all federations except the now defunct West Indies. In Canada, there is a recognition of provincial powers over telecommunications activities solely within provincial boundaries, although in a context of increasing globalization of information systems, this distinction is perhaps much less evident now than it was in 1867. In any event, a recent Supreme Court decision has confirmed the authority of the federal government to regulate the interprovincial and international aspects of telecommunications.[20] The matter of broadcasting, unlike postal services, was not foreseen in the constitutions of the older federations, and thus jurisdiction over its regulation has been determined largely through judicial review.

In the broad field of natural resources (mineral and otherwise), allocations of legislative powers and functions vary significantly across the federal systems under examination and therefore it is difficult to discern general patterns. Suffice to say that for different aspects concerning the regulation and development of natural resources, *both* orders of government have come to assume varying levels of legislative responsibility. In the area of fisheries, the distinction is usually made between marine and inland jurisdictions, with the federal government typically assuming legislative responsibility for the former and the provincial governments for the latter.

[20] *AGT v. CRTC and CNCP* [1989] Supreme Court of Canada.

### *3. Social Affairs*

Under this very broad heading are matters such as education, health, labour and social services. Without being elevated to the level of a general principle, it can be said with some authority that in the field of social affairs, the regional governments of federal systems generally have more legislative responsibility than in the other categories of powers under examination in this study. This is evident in the considerable extent of exclusive provincial and concurrent jurisdiction in these subject matters, but the patterns are by no means uniform throughout the twelve federal systems. Federal governments too are involved in the broad field of social affairs. In the oldest of the established federations, relatively few aspects of social legislation were constitutionally enumerated as a federal authority, but there has since been a trend towards increased federal powers in these matters. This trend is identifiable in relation to subsequent formal constitutional amendments, judicial review, increased financial powers of the general governments, and the extent of intergovernmental cooperation which evolved in the post-war development of the modern welfare state.

In the field of primary and secondary education, provincial orders of government in the established federations and some new Commonwealth federations are the principal, and in most cases exclusive, legislative authority. This is especially evident in two of the established federations, Switzerland and Canada, where religious and linguistic minorities are territorially concentrated within particular constituent units of the federation. Contrary to this pattern, the desire in Malaysia and Nigeria to strengthen national unity through common education resulted in legislative jurisdiction being placed originally with the federal governments. In Malaysia, the state of Singapore was exempted from federal authority in this case, while in Nigeria the emphasis was on the establishment of a federal secondary school system in all regions of the federation.

At the postsecondary level, there is no common pattern among federal systems regarding the allocation of legislative powers, but there are clearly more instances of federal involvement than at the elementary and high school levels. This federal involvement usually takes one of two forms. First, there is direct intervention through the establishment of universities by federal governments, examples of which can be found in Switzerland and Australia. (In Australia, the establishment of the Australian National University was essentially an exercise of the federal spending power since education is an exclusive state jurisdiction and all the other universities have been established by the state governments.) A more common federal role, however, is the provision of financial assistance, either to the institutions of higher learning themselves or to the state governments which are responsible for them, through the use of the federal spending power (discussed in a following section). This latter form of federal involvement is common throughout the established federations and several of the new Commonwealth federations.

An interesting feature of the distribution of powers in postsecondary education can be found in the constitution of the Federal Republic of Germany where a variant of concurrency, a "framework provision", enables the federal government to legislatively define general principles in this field while the Länder are left with the respon-

sibility to provide further details through their own legislative and executive initiatives. It is also of interest to note that in the constitutions of many of the newer federations, universities and other postsecondary institutions are separated from the broad field of education, the former being a federal responsibility while education generally rests with state authority.

Jurisdictional responsibility for health services, particularly hospitals and public health and sanitation, is generally assigned to regional governments in federal constitutions. Federal governments however can play an important role in two respects. First, there are certain matters in which uniformity is deemed desirable for the proper functioning of a health system, and consequently the federal government often assumes responsibility, either independently or concurrently, for regulation of the medical profession and the establishment of pharmaceutical standards. Second, given the enormous public expenditure involved in the delivery of health services, federal governments have often played an integral role in providing funds to the constituent governments through a variety of grant and transfer schemes.

Provincial governments continue to have a significant and, in most cases, dominant responsibility for social services such as welfare, although in some of the newer federations — notably India, Pakistan and Malaysia — concurrent jurisdiction allows for greater involvement of the federal government in these matters. Less uniformity is evident among federal systems regarding the labour-related matters of unemployment insurance and pensions. Legislative authority for unemployment insurance comes under exclusive federal jurisdiction in Canada and Malaysia (the latter having had some asymmetrical features in relation to Singapore), a divided or concurrent authority in the United States, Australia, and the Federal Republic of Germany, and under exclusively provincial control in India. Control over pensions has also many different assignments. For example, divided authority is the practice in all of the newer Commonwealth federations except India. In the United States, Canada and India both levels of government are involved. The Canadian Constitution is unique in that it stipulates a *provincial* paramountcy for concurrent jurisdiction over pensions.

### *4. Law and Security*

Authority over the law in federal systems is subject to considerable variation. This becomes even more evident when viewed in relation to jurisdiction for the organization and administration of courts which adjudicate this law. In civil law, shared or concurrent jurisdiction is employed extensively in most federations. The Canadian Constitution has the unique feature of providing for the operation of a unique civil code in Quebec while in all other areas of the country the common law system is in effect. Legislative authority over the criminal law is typically assigned to the federal government, although in the United States and Australia constitutions this matter is a state responsibility.

As for the organization and administration of courts in federal systems, three general patterns are evident. The most centralized approach is found in Malaysia where there exists a single system of centrally organized courts. Since the federal government of the earlier federation of Malaya was already responsible for both the

civil and criminal law, the architects of the Malaysian federation considered it appropriate that the federal government should also have the authority over the establishment of a single court system. India and Pakistan are examples of the second approach in which the power to organize and assign jurisdiction over courts is divided between federal and regional authorities, but a single integrated system of courts is nonetheless maintained. The third and most common approach, that of providing both the federal and provincial governments with the power to create their own courts, allows for the potential development of a dual court system. This possibility exists in the established federations of Canada, the United States, Australia and Switzerland as well as in Nigeria, and the former federations of Rhodesia and Nyasaland and the West Indies. In practice, however, most federations have opted for a single integrated system in which the federal governments rely upon regional courts rather than their own to administer the vast majority of laws. Only in the United States has a fully parallel system of courts been established. Canada too needs to be distinguished, for although the provinces have made full use of their powers to organize and administer the court system, judges of the Superior, District and County courts in each province continue to be appointed by the federal government.

In the matter of internal security or policing, the assignment of jurisdictional authority has also varied in federal systems. State governments are exclusively responsible for the establishment and maintenance of police forces in Switzerland. In Canada, Australia and the United States, authority for policing has been divided in practice between both orders of government, resulting in the development of both regional and federal police forces. In Canada, however, eight of the ten provinces have opted for a cooperative arrangement in which the federal force (the RCMP) performs all policing services. In the new Commonwealth federations, particularly those approaching independence, control over policing and public order has proven to be a much more contentious issue. Fears that a federal government police force could be employed to suppress the autonomy of regions have been balanced by ones of the potential inability of regional forces to maintain public order in federation-wide emergencies. The geographically large and regionally disparate federations of India, Pakistan and the West Indies opted for provincial control of their police forces, while in Malaysia concerns over internal security weighed sufficiently to result in the assignment of federal government control over policing. Nigeria and Rhodesia and Nyasaland divided authority over this matter between both orders of government. Finally, jurisdictional responsibility for prisons varies considerably. If prisons have not been assigned exclusively to either the federal or the constituent governments, then authority over different aspects of the penal system is divided between the two orders.

### *5. Other Matters*

Finally, a number of other matters are briefly identified here since they have relevance to the current constitutional debate in Canada. In federal systems with diverse linguistic communities, the issue of language has often proven to be extremely controversial. A variety of approaches has been employed to accommodate this linguistic diversity, but one of particular interest is the *territorial* solution. This

approach seeks to allow particular linguistic groups, where concentrated in different territories, to manage their own language regimes. Switzerland, which has three official federal languages — German, French and Italian — is the classic example of this approach. While official multilingualism is practiced in institutions of the federal government, individual cantons have the jurisdictional authority over the language policy within their territory. In Belgium, the apparent evolution towards a federal structure of government has been based largely on the restructuring of the country's institutions along territorial linguistic lines.

Jurisdiction over aboriginal affairs in federal systems, where relevant, is predominantly a federal responsibility. This is usually achieved through exclusive federal authority, although constituent governments may have some involvement in relation to particular aspects through shared or concurrent powers. Explicit provisions to this effect can be found in the constitutions of Canada, Australia and Malaysia. In the case of Malaysia, the constitution makes a distinction between "aborigines" (restricted to those on the Malay Peninsula) and "natives" (confined to the state of Sarawak), and there is a degree of asymmetry in terms of how federal legislative powers apply to the two.

Explicit enumerations of legislative authority over environmental concerns are a rarity in the constitutions of most federal systems. This is not surprising since the environment has only recently become a prominent public policy concern. Nonetheless, the recognition of environmental concerns as affecting both local and global constituencies has naturally resulted in the exercise of authority for this subject matter involving both orders of government in most federal systems.

## B. Finance and Fiscal Relations

The allocation of jurisdiction over financial matters in federal systems is one of the most important features of the distribution of powers. If each order of government is to deliver properly and effectively the programs and services under its jurisdiction, sufficient fiscal resources must obviously be made available to that government. The distribution of financial powers in federal systems has been designed not only to meet the task of matching fiscal capacities to jurisdictional responsibilities, but also to provide for a degree of effective control over the functioning of the economy. Invariably, the financial frameworks which have developed around these powers are rather complex. Various extra-constitutional measures and instruments incorporated into the design of these frameworks have introduced an important element of flexibility in the practice of federalism. Three dimensions of these financial arrangements will be briefly explored: powers over taxation; arrangements for intergovernmental finance (e.g. transfers); and the special case of the federal spending power.

### *1. Taxation and Revenue Collection*

Customs and excise duties were the dominant source of revenue for most federations at the time of their founding, and nearly all federal constitutions have placed these matters under exclusive jurisdiction of the federal government. Assignment of this responsibility to the federal order was considered a necessary and minimum

requirement for establishing a federation-wide internal common market. A significant exception to this practice was evident in the short-lived constitution of the West Indies federation, which placed these matters under concurrent jurisdiction. As well, the United States empowers the state governments to levy excise duties, and they do so extensively. With the gradual shift towards income taxation as the primary revenue source for governments everywhere, federal governments have also maintained their dominant position through a major role in income taxation, through a broad interpretation of existing constitutional provisions or subsequent constitutional amendments.

In the established federations, corporate taxation is primarily a shared or concurrent field, the notable exceptions being Switzerland and Austria where exclusive federal control is maintained. Personal income taxation is more broadly distributed to both orders of government in these federal systems, including Switzerland. In most of the newer Commonwealth federations, exclusive federal powers are the rule for corporate taxation, whereas in the field of personal income tax, by and large both orders of government have legislative authority. Again, the West Indies must be distinguished from the other new federations in that corporate and personal income taxation were designated as a concurrent authority.

Perhaps the most striking feature about fiscal powers in nearly all federal systems is that the vast majority of major revenue sources have been placed under federal authority. In the established federations, the constitutional frameworks for these fiscal powers have included the extensive use of concurrent jurisdiction — this is particularly evident in the Federal Republic of Germany — but in most of these cases the federal governments still predominate, largely because of provisions limiting the range of tax sources, both direct and indirect, that state governments can draw upon. In the new Commonwealth federations, concurrency has been widely avoided in the distribution of financial powers, and the assignment of exclusive fields of taxing jurisdiction is more the rule. The main exception is the now defunct federation of the West Indies, which placed nearly all major tax sources, including customs and duties, under concurrent authority.

### *2. Intergovernmental Transfers*

In the realm of intergovernmental fiscal relations, every federal system has essentially two main problems to deal with. The first, vertical fiscal imbalance, is concerned with the allocation of revenues between federal and provincial governments. As demonstrated, in most federations there is a concentration of the major revenue sources in the federal government, while at the same time *both* orders of government have significant, constitutionally mandated expenditure responsibilities. Thus, there is a need for financial transfers from the federal to the provincial orders of government. Horizontal fiscal imbalance, on the other hand, relates to the varying fiscal capacities of the individual constituent units. Often, a system of equalization payments (funded by either or both orders of government) is instituted with the aim of ensuring that the constituent governments have sufficient resources to provide

public services at a level comparable to each other. Given these imbalances, it is evident that intergovernmental transfers are an integral feature of federal financial frameworks.

The arrangements for these transfers can be rather complex, but they do provide for an important element of flexibility in the functioning of federal systems. In the words of K.C. Wheare, "There is and can be no final solution to the allocation of financial resources in a federal system. There can only be adjustments and reallocations in light of changing conditions."[21] In some federations, the basic principles underlying these financial arrangements are identified in the constitution, but for the most part there has been a *de facto* development of these arrangements, achieved largely through executive negotiation.

To redress the problem of vertical fiscal imbalance in federal systems, two types of transfers have been employed. Unconditional transfers occur on a no-strings-attached basis, leaving provincial governments to spend these federal funds in any way they see fit. Conditional transfers, on the other hand, are funds designated by the federal government for specific purposes and whose receipt by provincial governments is dependent on meeting certain conditions. Traditional arguments in favour of this type of transfer include the encouragement of provincial expenditure on matters of federation-wide economic interest, the maintenance of minimum federation-wide standards for certain social services, and the retention of a degree of financial accountability for the federal expenditures. However, such transfers can also have the adverse effects of distorting provincial spending priorities (particularly in matching funding schemes) and contributing to excessive or uncontrolled spending of both levels of government. Clearly, the most contentious aspect is the degree of federal control over the constituent governments of a federation, particularly when such transfers are designated for areas of exclusive provincial jurisdiction (this issue is developed further in the following section on the federal spending power).

The type of transfer employed to redress vertical fiscal imbalance in the established federations has varied. In the United States, the conditional transfer (or "categorical grant" as it is more commonly called) is the primary instrument for this purpose, comprising over 80 percent of all transfers from federal to state governments. In Australia, Canada and Switzerland, a more moderate use of the conditional transfer is employed, ranging anywhere from a third to one-half of all transfers. The Federal Republic of Germany is unique in employing *only* conditional transfers from the general to the Land governments. However, the significance of these transfers in quantitative terms is rather limited relative to other federal systems, largely because the Land governments already participate extensively in different forms of tax revenue-sharing with the federal government under the provisions enumerated in Article 106 of the *Basic Law*. The pattern is quite the contrary in the new Commonwealth federations, where there is an overwhelming preference to use unconditional transfers to achieve a reasonable degree of vertical fiscal balance without interfering with state autonomy.

[21] Wheare, *Federal Government*, p. 117.

Considerably more complexity and diversity of approach is encountered when one looks at how various federal systems have attempted to redress the problem of horizontal fiscal imbalance. A commitment to the basic principle of equalization is often explicitly identified in the constitution, as in the case of the Federal Republic of Germany and Canada, but the actual method is usually defined by ordinary legislation or merely through executive agreement. Of the established federations, the United States is alone in having no formal or systematic equalization scheme, although there are a number of equalizing features in the vast array of categorical grants transferred to the states (usually based on per capita criteria). In Australia, for the period 1933-82, equalization payments from federal to state governments were based on a determination of the actual fiscal needs of the claimant states by the independent Commonwealth Grants Commission. Canada and Switzerland have also developed formal equalization schemes, both of which are based on relatively complex formulas taking into account a variety of different factors.

Perhaps the most innovative approach to horizontal equalization, however, is found in the Federal Republic of Germany. Article 107 of the *Basic Law* is unique in providing for the transfer of revenues *amongst* the constituent units themselves. An interstate revenue pool exists in which the richer Länder pay in and the poorer Länder draw out according to a specified formula. Supplementing this interstate system of equalization payments is a federal scheme in which payments from the federal government to the poorer Länder are funded by a fixed percentage of the proceeds of the centrally administered value added tax. The approach to equalization in the new Commonwealth federations has been largely based on the distribution of unconditional grants from the federal to the regional governments. Fiscal need of the constituent units has usually been the criterion for the particular distribution, often determined by a specially appointed commission or intergovernmental council, and India, Pakistan and Malaysia are primary examples of this approach.

In summary, it appears that there are two situations which have given rise to a strong emphasis on horizontal equalization policies. The first instance occurs when "nationalizing forces" in a country are relatively strong while regional conflicts are of relative insignificance. A good example of this is the Federal Republic of Germany, which has a significant degree of homogeneity amongst its constituent units. The other and more typical situation is one in which there are marked disparities in resources amongst the constituent units or regions of a federation. This is evident in many of the new Commonwealth federations as well as in Canada.

### *3. The Federal Spending Power*

The allocation of jurisdictional responsibilities to either federal or provincial governments for particular matters usually assumes that the order of government in question has the authority to make expenditures on the subject. However, the situation also arises in federal systems where governments may possess a *general* spending power. While such a power can apply to both orders of government in a federal system, the use of it by the federal government is usually of more significance (an example of a state spending power in an area of federal jurisiction would be the establishment of trade promotion offices outside the federation). The significance of

the spending power is that it permits the federal government to pursue certain objectives which it would otherwise not be permitted to do through ordinary legislation. The spending power has often been employed by the federal governments to assist constituent governments when they could not afford to provide the services being demanded of them. This was particularly evident in several of the established federations during the economic depression of the 1930s.

However, it has also proven to be a source of considerable controversy and intergovernmental conflict, often being perceived by constituent governments as an invasion of their areas of exclusive jurisdiction by the federal government. This is particularly the case when spending on matters under state authority continues uninvited or, in the alternative, is withdrawn without notice. In Canada, provincial governments have complained that the federal government is attempting to "off load" its huge public debt by reducing fiscal transfers made under the authority of the spending power. Similar concerns in the United States have been characterized as "fend-for-yourself" federalism.

In the established federations where the federal spending power has been employed (e.g., the United States, Canada and Australia), the constitution does not explicitly identify a general spending power. While the degree of latitude may vary, the courts in these federations have, nonetheless, recognized that the taxing and appropriating powers of the federal government can be used to affect a field of activity beyond the confines of its normal legislative powers. To this extent, it could be said that the power enjoys a *de jure* existence.

In contrast, all the new Commonwealth federations have explicitly recognized in their constitutions the authority of federal governments to provide grants to provincial governments for *any* purpose, whether that purpose is under general government jurisdiction or not. Moreover, several of these newer federations, such as India and Nigeria, ascribe this same general power to provincial governments, making it possible for these governments to provide financial assistance to the federal government should it ever prove necessary.

# IV. Conclusion

In this broad-ranging overview, it is clearly evident that there is no single uniform approach to the distribution of government powers and functions in federal systems. Indeed, one may be overwhelmed by the variety of arrangements that have been employed to enumerate and allocate areas of jurisdictional authority between the two orders of government in the federations and "federalizing" systems examined in this study. Notwithstanding the diversity of these approaches, however, it is also important to recognize that the devices, instruments and allocations which have proved effective in one federal system have often been successfully adapted or modified to suit other federations. Such comparative perspectives, therefore, can be instructive for countries currently engaged in the process of constitutional review.

Clearly, any agenda for reforming the constitutional distribution of powers and functions in the Canadian federal system must be based on present realities and demands for change within the country. As well, it will inevitably take into account previous attempts at or proposals for such constitutional change. This comparative overview, however, demonstrates the broad range of possible approaches to the reform of the distribution of powers — both in terms of its form and enumeration as well as the scope of allocated authority — which may be considered in the current constitutional debate. Within such a fluid and dynamic environment, selective use of proven instruments and devices employed in other federal systems may well serve a useful purpose for constructive constitutional reform here in Canada.

# Appendix A

## Factors Relevant to a Federal Distribution of Powers (Australia)*

1. Whether a matter can be effectively handled by the States acting either
   (a) by themselves
   (b) or in cooperation with each other and/or with the Commonwealth.
2. Whether the control of a matter does not lend itself to fragmentation or its exercise by more than one level of government.
3. The existence of the necessary administrative and financial resources to support the exercise of a power.
4. Whether there is a need for uniformity on matters common to all Australians and if so the feasibility of obtaining that uniformity without altering the present distribution of powers.
5. The desirability of allowing social and political experimentation and diversity.
6. The desirability of ensuring the maximum diffusion of powers as one means of protecting individual liberty.
7. The need to avoid the unnecessary duplication of administrative resources and personnel by the Commonwealth and the States.
8. The desirability of the States retaining a role in the administration and implementation of policies and laws devised by the national government even if a power is assigned to the Commonwealth.
9. Linkages which exist between the powers distributed to both levels of government.
10. The desirability of encouraging greater responsiveness to the needs, interests and attitudes of particular regions.

* Australia, Advisory Committee to the Constitutional Commission, *Report on the Distribution of Powers* (Canberra: Commonwealth of Australia, 1987), pp. 217-18.

11. The ability of the courts to supervise the observance of present and proposed federal limitations on national legislative powers including limitations to preserve the independence of the States, i.e. the need to ensure the availability of workable judicial standards in interpreting and applying those standards.
12. Distribution of powers in other federal countries.
13. The existence in certain circumstances of exceptional or special reasons for not adhering to the normal distribution of powers, e.g., emergencies like a war.
14. The political feasibility of altering the present distribution of powers in any given area and the relevance of past attempts at change.
15. The problem of separating the distribution of powers from any current view as to how those powers may be exercised in the future.

# Appendix B

## The Distribution of Powers and Functions in Federal Systems: A Comparative Overview

The purpose of this appendix is to provide a comparative perspective on the constitutional distribution of powers and functions in twelve federal systems. Information in these tables is based on a reading of available constitutional texts, academic interpretive texts and other sources. The tables indicate whether legislative authority for a subject matter is a Federal (F), State (S) or Concurrent (C) authority (variations or exceptions to these standard classifications are noted — please refer to the legend at the bottom of each page). A space left blank can imply one of two things: the subject matter is either not explicitly mentioned or dealt with in the constitution, or the power to legislate over it rests with the residual authority (as noted in the first line of the table). It is important to acknowledge that in some cases, particular allocations of authority are subject to varying legal interpretations. In any event, individual constitutional documents should be consulted for greater detail.

# The Distribution of Powers and Functions in Federal Systems: A Comparative Overview

| | Canada (1867) | United States (1789) | Switzerland (1848) | Australia (1901) | Germany (1949) | Austria (1929) | India (1950) | Pakistan (1962) | Malaysia (1963) | Nigeria (1960) | Rhodesia and Nyasaland (1953) | West Indies (1957) |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| **BASIC FEATURES** | | | | | | | | | | | | |
| Residual Power | F | S | S | S | S | S | F | S | S | FS | S | S |
| Enumeration of State Powers | Yes | No | No | No | Yes | Yes | Yes | No | Yes | No | No | No |
| Delegation of Legislative Authority | No | No | No | Yes | No | No | Yes | Yes | Yes | No | Yes | Yes |
| **SCOPE OF POWERS** | | | | | | | | | | | | |
| **Finance and Fiscal Relations** | | | | | | | | | | | | |
| Taxation | | | | | | | | | | | | |
| ... Customs/Excise | F | F/C | F | F | F | F | F/FS | F | F* | F | FS | CS |
| ... Corporate | FS | C | F | C | C† | F | F | F | F | C | FS | C |
| ... Personal Income | FS | C | FS | C | C† | F | FS | FS | F | C | FS | CF |
| ... Sales | FS | C | F | C | C† | F | FS | F | F* | C | FS | |
| Equalization | F | | F | | FS | | | | | C | | |
| Debt and Borrowing | | | | | | | | | | | | |
| ... Public Debt of the Federation | F | F | F | F | F | F | F | F | F | F | | |
| ... Foreign Borrowing | FS | FS | FS | C | FS | F | F | FS | F | F | FS | FC |
| ... Domestic Borrowing | FS | FS | FS | C | FS | | FS | FS | FS | F | FS | FC |

Legend:

F = federal power

S = state (province/canton/Länd) power

C = concurrent power (federal paramountcy except where denoted C†)

* = asymmetrical application of powers

† = federal legislation in this field administered by states

Note: italics denote *de facto* distribution of powers and functions

# The Distribution of Powers and Functions (cont'd)

| | Canada (1867) | United States (1789) | Switzerland (1848) | Australia (1901) | Germany (1949) | Austria (1929) | India (1950) | Pakistan (1962) | Malaysia (1963) | Nigeria (1989) | Rhodesia and Nyasaland (1953) | West Indies (1957) |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| **International Relations** | | | F | | F | F | F | F | F | F | F | |
| ... Defence | F | FS | F | FS | F | F | F | F | F | F | F | F |
| ... Treaty Implementation | F[1] | F | F | F | FS | F[1] | F[2] | F[2] | F[2]S | F[1]C | F[1]C | FC |
| ... Citizenship | F | F | F* | F | FC† | FS† | F | F | F[a] | F | FC | C |
| ... Immigration (into federation) | C | C | C | C | C† | F | F | F | F[a] | F | FC | F |
| ... Immigration (between regions) | | | | | C† | | F | | C[a] | C | C | C |
| **Functioning of Economic Union** | | | | | | | | | | | | |
| "Trade and Commerce" | F | F | F | F | C† | F | F | | F | F | | |
| External Trade | F | F | F | C | | | F | F | F[a] | F | F | C |
| Inter-state Trade | F | F | F | C | | | F | F | F[a] | F | C | C |
| Intra-state Trade | S | S | | S | | | SC | | F[a] | S | FS | S |
| Currency | F | F | F | F | F | F | F | F | F | F | F | C |
| Banking | FS[3] | C | F | C | C† | F | F | FS | F | F | FC | C |
| Bankruptcy | F | FS | | C | | F | C | | F | F | | |
| Insurance | FS | FS | FS | C | | F | F | FS | F[a] | F | FS | C |

Legend:

F = federal power
S = state (province/canton/Länd) power
C = concurrent power (federal paramountcy except where denoted C†)
[a] = asymmetrical application of powers
† = federal legislation in this field administered by states
Note: italics denote *de facto* distribution of powers and functions

This page:

[1] = requires consent/implementing legislation of state governments
[2] = requires consultation (non-binding) of state governments
[3] = banking is exclusively federal but savings and credit unions are provincial
* = cantonal governments are free to set standards within the limits imposed by federal legislation

## The Distribution of Powers and Functions (cont'd)

| | Canada (1867) | United States (1789) | Switzerland (1848) | Australia (1901) | Germany (1949) | Austria (1929) | India (1950) | Pakistan (1962) | Malaysia (1963) | Nigeria (1960) | Rhodesia and Nyasaland (1953) | West India (1957) |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Transportation and Communications | | | | | FC† | | | | F | | | |
| ... Roads and Bridges | S | FS | FS | FS | C† | FS | FS | | FS | FS | FC | |
| ... Railways | FS | FS | F | FS | FC† | F | F | S | F* | F | F | |
| ... Air | F | F | F | FS | | F | F | F | F | F | F | C |
| ... Telecommunications | FS | FS | F | C | F | F | F | F | F | F | F | C |
| ... Postal Services | F | F | F | C | F | F | F | F | F | F | F | C |
| ... Broadcasting | F | F | | C | FC† | F | F | F | F | FS | C | C |
| Agriculture | C | S | FS | *SC* | C† | F† | SC | | SC* | CS | F*C*S | |
| Fisheries | FS | S | | FS | C† | | FS | FS | FS | FS | | CS |
| Mineral Resources | FS | S | | S | | F | FS | | FS | F | | |
| Nuclear Energy | F | FS | F | C | C | F | F | F | | F | F | C |

Legend:

F = federal power
S = state (province/canton/Länd) power
C = concurrent power (federal paramountcy except where denoted C*)
* = asymmetrical application of powers
†= federal legislation in this field administered by states
Note: italics denote *de facto* distribution of powers and functions

# The Distribution of Powers and Functions (cont'd)

| | Canada (1867) | United States (1789) | Switzerland (1848) | Australia (1901) | Germany (1949) | Austria (1929) | India (1950) | Pakistan (1962) | Malaysia (1963) | Nigeria (1960) | Rhodesia and Nyasaland (1953) | West Indies (1957) |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| **Social Affairs** | | | | | | | | | | | | |
| Education and Research | | | | | | | | | | | | |
| ... Primary and Secondary Education | S | S | C†S | S | S | FS | CS | | F[a] | SC | FS | |
| ... Postsecondary Education | S | FS | FC†S | FS | C†* | F | FCS | | F[a] | FC | F | F |
| ... Research and Development | | FS | C† | FS | C† | FS | FCS | FS | F[a] F | C | C | F |
| Health Services | | | | | | | | | | | | |
| ... Hospitals | *SF* | *SF* | S | FS | C† | C† | S | | F[a] | C | C | |
| ... Public Health and Sanitation | S | S | C† | S | C† | FS | S | | FC F | C | C | |
| Labour and Social Services | | | | | | | | | | | | |
| ... Unemployment Insurance | F | FS | C† | C | C† | F | S | | F[a] | | | |
| ... Income Security | FS | | FC | C | C† | F | CS | | F[a] | FS | F | |
| ... Social Services | *SF* | *SF* | C† | C | | S | CS | C | C | FS | S | |
| ... Pensions | C[a] | C | C† | C | | F | C | FS | F[a]S | FS | FS | FS |

Legend:
- F = federal power
- S = state (province/canton/Länd) power
- C = concurrent power (federal paramountcy except where denoted C[a])
- [a] = asymmetrical application of powers
- †= federal legislation in this field administered by states

Note: italics denote *de facto* distribution of powers and functions

This page:
* enumerated as a "framework provision" in which the general government can enunciate general principles, leaving *the Länder to* provide further details through their own legislation and executive action

# The Distribution of Powers and Functions (cont'd)

| | Canada (1867) | United States (1789) | Switzerland (1848) | Australia (1901) | Germany (1949) | Austria (1929) | India (1950) | Pakistan (1962) | Malaysia (1963) | Nigeria (1960) | Rhodesia and Nyasaland (1953) | West Indies (1957) |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| **Law and Security** | | | | | | | | | | | | |
| ... Civil Law | S | S | F | FS | C† | FS* | C | | F*S | CS | CS | C |
| ... Criminal Law | F | S | F | S | C† | FS* | C | | F | FC | | C |
| ... Organization of Courts | FS | FS | S | FS | C† | F | FS | FS | F* | FS | FCS | FS |
| ... Internal Security (police) | FS | FS | S | SF | C†S | FS | FS | S | F | FS | FCS | S |
| Prisons | FS | FS | S | S | | F | S | | F | F | | |
| **Other Matters** | | | | | | | | | F | | | |
| Language | FS | | S | | | | FS | | FS | FC | | |
| Culture | FS | | C† | | | | | | C | FC | | |
| Aboriginal Affairs | F | F | | C | | | FS | FS | F* | | | |
| Environment | FS | FS | C† | FS | C† | FS | | | | FS | | |
| Municipal Affairs | S | S | S | S | S | S | S | | F*S | S | | |

Legend:

F = federal power
S = state (province/canton/Länd) power
C = concurrent power (federal paramountcy except where denoted C†)
* = asymmetrical application of powers
†= federal legislation in this field administered by states
Note: italics denote *de facto* distribution of powers and functions

This page:

* states may legislate in the fields of criminal and civil law if necessary to dispose of an item within the scope of their legislative competence (Article 15, paragraph 9)

# Selected Readings


Herperger, Dwight and Ronald L. Watts, *Looking Forward, Looking Back: Constitutional Proposals of the Past and their Relevance in the Post-Meech Era* (Montreal: Council for Canadian Unity, 1990).

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